IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-175

JOHN B. O'MALLEY, JR.,

VS. Petitioner,

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TINSLEY, FRANTZ, FLEMING and DAVIDSON, P.C.
Mansur Tinsley
Albert T. Frantz
7180 West 14th Avenue
Lakewood, Colorado 80215
Telephone: 237-5415

Attorneys for Petitioner

INDEX

TABLE OF CITATIONS

Cases

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

JOHN B. O'MALLEY, JR.,)
Petitioner,)
VS.)
)
UNITED STATES OF AMERICA)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE

TENTH CIRCUIT

John B. O'Malley, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on April 22, 1976, affirming the conviction of the Petitioner by the United States District Court for the District of Colorado.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of conviction of Petitioner for violating Title 18, U.S.C. Sec. 1343. Petitioner was tried in the District Court before a jury and there is no opinion of that court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 22, 1976, and petition for rehearing denied on July 8, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1). Copy of the opinion is appended to this petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendent can be deemed to have devised a scheme to defraud when, under his written proposal to the alleged intended victim, such "victim" would have purchased a quantity of precious metals from the defendant but would have paid only when satisfied that what it had received was what it had bought.

2. Whether a defendant can be deemed to have devised a scheme to defraud his alleged intended victim, when, according to all of the evidence, such "victim" was allowed to examine defendant's plant in detail and received samples of ores being processed in the plant and a metal bar which defendant represented as sources of the precious metals, prior to being asked to enter into any kind of contract.

3. Whether the Court of Appeals for the Tenth Circuit, by referring to another case in another court against this defendant, in order to verify the existence of a fraudulent

scheme, has unconstitutionally denied this defendant a fair trial.

4. Whether the Court of Appeals for the Tenth Circuit, by its interpretation of Section 1343 of Title 18 of the United States Code, has infringed upon defendant's constitutional rights to negotiate for and to enter into a contract.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner relies on the following provisions of the Constitution of the United States:

A) Article IX. "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

B) That part of Article V which provides that no person shall "be deprived of life, liberty, or property, without due process of law."

Title 18 U.S.C., Sec. 1343 provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Vol. 4 U.S.C. page 4302).

CONCISE STATEMENT OF THE CASE

Defendant O'Malley, a registered professional engineer and self-taught specialist in metallurgy, was the operator of an ore

reduction and assaying plant in Denver, Colorado, under the name of Applied Chemicals, Inc. He informed a number of metal brokers that he was able to produce a large quantity of platinum for sale. This information reached a Pennsylvania corporation, Matthey Bishop, Inc., a subsidiary of the largest or one of the largest purchasers of precious metals in the world. Inexplicably, although Matthey Bishop never really intended to purchase precious metals from Defendant O'Malley's company, it sent a company official, together with an F.B.I. agent disguised as a company official, to talk with Defendant O'Malley. During this and a second trip, these two representatives carefully examined Defendant O'Malley's plant and participated in what appeared to be preliminary negotiations for a contract of purchase.

Defendant O'Malley represented that he had a source of platinum ore and had in storage some partially refined metal bars containing platinum, from which he would be able to produce platinum metal of a specified purity through a hitherto unrecognized process. O'Malley and his attorney, along with the Matthey Bishop representatives, composed a letter of intent (Plaintiff's Exhibit 3E) which Defendant O'Malley signed and gave to the Matthey Bishop official, for signing on behalf of Matthey Bishop if and when it decided to deal with O'Malley.

Defendant O'Malley supplied to the Matthey Bishop official one of the metal bars, selected at random by the Matthey Bishop man, along with samples of materials passing various stages of processing in O'Malley's plant, for sampling. Matthey Bishop turned these over to the F.B.I. for Assaying. The F.B.I. assayers determined that the bar contained only lead, although the other samples revealed precious metals in commercial quantities. A grand jury indictment against Defendant O'Malley ensued, alleging violations of Sections 2 and 1343 of Title 18. United States Code--use of telephone communications to accomplish a scheme to defraud Matthey Bishop.

There was testimony by government witnesses tending to show that some of O'Malley's representations were unfounded, exaggerated or even false, but there was no testimony showing how O'Malley planned to separate Matthey Bishop

from any portion of its assets. There was some conflict of evidence, particularly on the subject of the effectiveness of O'Malley's methods of assay and of extraction of precious metals from host materials, but there was no disagreement that Plaintiff's Exhibit 3E was O'Malley's complete proposal to Matthey Bishop, reduced to writing. Admittedly, this was the joint product of O'Malley and his attorneys and of Matthey Bishop's representatives, even though it was not signed on behalf of Matthey Bishop, and it came into the case as the government's evidence. It read:

"Matthey Bishop, Inc.
"Malvern, Pennsylvania 19355
"Attention: Mr. Joseph Lanahan
"Gentlemen:

"This letter is intended to portray our tacit understanding of the proposed relationship between Applied Chemicals, Inc., of Denver, Colorado and Matthey Bishop, Inc., of Malvern, Pennsylvania.

"Applied Chemicals, Inc., at the present time, is preparing to produce at Denver, Colorado, both platinum and iridium and intend to have a facility available to produce such articles on or before September 1, 1974. This facility is intended to produce not less than 1500 ounces per month of either iridium in bar form or iridium in salt or chloride, commenly (sic) known as amonium chloroiridate, and 1500 ounces platinum per month 99.5 fine, in acceptable commercial form and standard.

"Applied Chemicals, Inc., further proposes to enter into an agreement with Matthey Bishop, Inc., for the purchase of such metalics on the basis of Producer's Market as referred to in Daily Periodical known as American Metal Market of Producer Listing i.e., Englehard Industries or Johnson Matthey. Such price to be fixed by such

standard on date of delivery of and acceptance of such metal.

"The intimate details of delivery and assay and first right of refusal of any over plus of such production shall be part of an agreement to be drawn between Applied Chemicals, Inc., and Matthey Bishop, Inc. The contract referred to herein shall be executed prior to September 1, 1974, provided that such contract is acceptable to both parties.

"Applied Chemicals, Inc., assumes the obligation of compensation to any Broker or Brokers in conjunction with this transaction.

"It is specifically to be understood that a Secrecy Clause shall be included in the agreement referred to herein and shall not be divulged to anyone outside of signators to such agreement.

"The terms of the foregoing is subject to the acceptance of Matthey Bishop, Inc.

"Very truly yours,
"APPLIED CHEMICALS, INC.,

"/s/ John B. O'Malley, Jr.
"John B. O'Malley, Jr. President

"The foregoing letter, read, understood and its terms agreed to this _____ day of August, 1974.
"MATTHEY BISHOP, INC.
"BY _____"

The Court of Appeals, in addressing the defense's argument that O'Malley's proposal could not have resulted in a loss to Matthey Bishop, referred to statements contained in the opinion of the Colorado Court of Appeals in People v. O'Malley, No. 75-240, filed April 8, 1976, not to be reported:

"A recent opinion of the Colorado Court of Appeals involving this same defendant, O'Malley, is illustrative of the latter's modus operandi... There O'Malley was trying to sell silver. There, as here, O'Malley escorted his prospective customer around the premises of Applied and made false representations as to the current capacity of the plant to produce silver. Indeed, a reading of that opinion indicates that O'Malley's misrepresentations were quite similar to those made in the instant case. There, however, the intended victim was not as wary as Matthey-Bishop and the victim in that case paid O'Malley some $60,000 on the latter's promise to sell him silver. In the Colorado case a jury found O'Malley guilty of theft by deception, Sec. 18-4-401, C.R.S. 1973, and in effect found that O'Malley never intended to deliver the silver which he had contracted to deliver."

FEDERAL JURISDICTION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Jurisdiction of the District Court for the District of Colorado is based upon the charge of violation of a federal criminal statute, to wit: Title 18 U.S.C. Sec. 1343.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because it erroneously interprets the fraud by wire statute, and erroneously and unconstitutionally applies the statute to the facts of the case. The opinion of the Court of Appeals shows, further, that it relied upon the decision of another court in another case against Defendant O'Malley to arrive at its own decision affirming the trial court's judgment. This procedure infringes upon Defendant O'Malley's constitutional right to a fair trial.

The "wire fraud statute," 18 U.S.C. 1343, certainly requires a scheme which is capable of defrauding, as well as the use of interstate wires to accomplish the scheme. If O'Malley's proposal or "scheme" could not defraud Matthey Bishop as alleged, there could be no violation of the statute. In speaking of the "mail fraud statute," 18 U.S.C. 1341, which is substantially identical to the "wire fraud statute," the Circuit Court of Appeals for the 10th Circuit in Rude v. United States, 74 F.2d 673, 675, pointed out that

> "...the formation of a scheme or artifice to defraud is an essential element (even though)...the gist of the offense is the use of the mail for the purpose of executing or attempting to execute such scheme..."

Defendant O'Malley's proposal or "scheme" was set forth in the letter of intent (Plaintiff's Exhibit 3E) which was a clear, straight-forward statement of what Applied Chemicals (O'Malley) was to do, and what Matthey Bishop was to do. O'Malley was to deliver 1500 ounces of iridium and 1500 ounces of platinum per month, "999.5 fine, in acceptable commercial form and standard." Matthey Bishop was to pay the price listed" in Daily Periodical known as American Metal Market...on date of delivery of and acceptance of such metal." "The intimate details of delivery and assay and first right of refusal of any over plus of such production (would) be part of an agreement to be drawn between Applied Chemicals, Inc., and Matthey Bishop, Inc....(which would) be executed prior to September 1, 1974, provided that such contract (was) acceptable to both parties." (Emphasis by undersigned.)

Possibly, Defendant O'Malley would not have been able to produce the precious metals in the quantity and purity specified but, if so, Matthey Bishop would have paid for nothing which it found unacceptable. Accomplishment of a fraud would have been impossible, especially with one of the world's foremost precious metals dealers as the "victim". Furthermore, no final contract was even to be executed unless such a contract were "acceptable to both parties."

The letter of intent (Plaintiff's Exhibit 3E) accompanied samples of ore being processed in O'Malley's plant, as well as a bar of metal, which were supplied by O'Malley at the request of Matthey Bishop's representatives for the purpose of assaying the material. As this Court remarked in Southern Development Co. v. Silva, 125 U.S. 247, 259, 8 S.Ct. 881, 31 L.Ed. 678, involving the purchase of a silver mine by a purchaser who had "several assays" made of the ore,

> "Where the purchaser undertakes to make investiations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations."

Similarly, where a machine had been used by a party under lease for three months prior to the party's purchasing it, the California Appeals Court ruled that representations by the seller regarding performance capability of the machine could not constitute fraud. Troy Laundry Mach. Co. v. Drivers Independent Laundry Co., 14 Cal.App. 152, 111 Pac 121.

If the type of contract proposed by Defendant O'Malley's letter of intent were in fact proscribed by 18 U.S.C. 1343, then serious doubt would cloud the statement of principle set forth in Section 373, 16 Am.Jur.2d 704, 705:

> "Although the term 'freedom of contract' does not appear in the Constitution, the right to enter into a contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth and Fifth Amendments of the Constitution of the United States."

In 1894 Justice Brewer, speaking for this Court in Frisbee v. U.S., 157 U.S. 160, 165, 39 L.Ed.657, 15 S.Ct.586, said that "generally speaking, among the inalienable rights of the citizen is that of liberty of contract..." (Emphasis by undersigned). Three years later Justice Brewer in Allgeyer v. Louisiana, 165 U.S. 578, 591, 41 L.Ed.832, 17 S.Ct. 427, added that

"...in the privilege of pursuing an ordinary calling or trade, and of acquiring, holding or selling property must be embraced the right to make all contracts in relation thereto."

More recently, this Court has described the free and unrestricted right to contract on lawful matters as a part of the liberty guaranteed to every citizen. Bayside Fish Flour Co. vs. Gentry, 297 U.S. 422, 80 L.Ed. 722, 56 S.Ct. 513.

The Court of Appeals' reliance upon the decision of the Colorado court in People v. O'Malley is emphasized by the statement at page (4) of its opinion:

"And the mere fact that Matthey-Bishop was suspicious from the start does not mean that the defendants did not themselves have a scheme to defraud some unwary purchaser, whoever he might be." (Emphasis by the undersigned).

The reference to "some unwary purchaser, whoever he might be," suggests that the Court of Appeals might have lost track of the necessity that the evidence, to be sufficient, must show a scheme to defraud Matthey Bishop, as alleged in the indictment, not "some unwary purchaser, whoever he might be."

It has long been recognized that appellate courts should not entertain matters dehors the record in order to resolve problems before them. Section 1797, 24A C.J.S. 410, 411. Concepts of fair play, fairness, and substantial justice forbid the consideration of statements from an opinion of another court in another case, since the defendant has had no opportunity to show their inapplicability to the case at hand. These concepts have been held by this Court to be the essence of the "due process" protected by the Fifth and Fourteenth Amendments to the United States Constitution. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 694, 98 L.Ed. 884, op.supp. 349 U.S. 294, 75 S.Ct. 751, 99 L.Ed. 1083; Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 742, 98 L.Ed. 911, reh.den. 348 U.S. 852, 75 S.Ct. 17, 99 L.Ed. 671.

The reference to "some unwary purchaser, whoever he might be," suggests that the Court of Appeals might have lost track of the necessity that the evidence, to be sufficient, must show a scheme to defraud Matthey Bishop, as alleged in the indictment, not "some unwary purchaser, whoever he might be."

CONCLUSION

This Court should review this case, because conviction of any defendant upon the basis of a "scheme to defraud" which could not have defrauded the alleged victim, through procedures which were fundamentally unfair, in disregard of constitutional protections, is a matter of substantial public concern.

Mansur Tinsley

Albert T. Frantz

Attorneys for Petitioner
7180 West Fourteenth Avenue
Lakewood, Colorado 80215
Telephone (303) 237-5415

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 75-1282

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN B. O'MALLEY, JR.,
Defendant-Appelant.

Appeal from the United States
District Court for the
District of Colorado.
(D. C. No. 74-CR-421)

Submitted on the Briefs.

James L. Treece, United States Attorney, and
Richard P. Slivka, Assistant United States Attorney, for
Plaintiff-Appellee.

Lawrence M. Henry, for Defendant-Appellant, and
John B. O'Malley, Jr. Defendant-Appellant, filed additional
Pro Se Brief.

Before LEWIS, Chief Judge, and BREITENSTEIN and McWILLIAMS,
Circuit Judges.

McWILLIAMS, Circuit Judge.

John B. O'Malley, Jr., and Thomas K. Hudson were jointly charged in a three-count indictment with violation of the so-called fraud by wire statute. 18 U.S.C. # 1343. Specifically, both were charged with devising a scheme and artifice to defraud Matthey-Bishop, Inc. of Malvern, Pennsylvania by means of false and fraudulent pretenses, representations and promises, well-knowing that such representations were false, and that in connection therewith had transmitted sounds by means of certain telephone conversations in interstate commerce. Each count was based on a different interstate telephone conversations. O'Malley's case was severed for trial purposes, and in a jury trial O'Malley was convicted on each of the three counts. On appeal counsel for O'Malley raises what is essentially one proposition, namely, the evidence is legally insufficient to show that O'Malley devised, or had an intent to devise, a scheme to defraud Matthey-Bishop. In other words, it is conceded here, as it was established in the trial court, that O'Malley and Hudson had used the telephone in interstate commerce to further their relations with Matthey-Bishop. It is O'Malley's contention, however, that he had not devised, nor did he ever intend to devise, a scheme to defraud Matthey-Bishop. Rather, according to counsel, the evidence only showed preliminary business negotiations between the two defendants and Matthey-Bishop, which negotiations did not culminate in an agreement between the parties, and which, under the peculiar circumstances of the case, never could have resulted in any agreement. The facts are somewhat on the bizarre side, and a brief summary thereof will put the case in focus.

O'Malley, a licensed civil engineer, had through practical experience acquired some knowledge in the fields of metallurgy and chemistry. O'Malley was the president of Applied Chemicals, Inc., a Colorado corporation, which had a refinery located in Denver, Colorado. Thomas K. Hudson, a Denver lawyer, represented both O'Malley and Applied, and O'Malley maintained a business office in Hudson's suite of law offices.

In June 1974, O'Malley and Hudson contacted various commodity brokers and let it be known that Applied had 300,000 ounces of platinum for sale. Brokerage agreements were made between these brokers and the two defendants. These brokers in turn contacted other brokers in their search for potential buyers of platinum. It was in this manner that a Mr. Cote eventually contacted Matthey-Bishop in Pennsylvania to ascertain if the latter was interested in buying platinum. Matthey-Bishop is a United States subsidiary of an English company which is one of the world's largest refiners of platinum. Matthey-Bishop immediately became suspicious because, in the first place, they were not familiar with Cote, and also because they were totally amazed at the large amount of platinum which was allegedly available for purchase. Because of these suspicions, Matthey-Bishop contacted the F.B.I. at once. It was agreed that Matthey-Bishop would follow through and make contact with O'Malley and Hudson, and that one Joseph Lanahan, the manager of the metal control group of Matthey-Bishop, would go to Denver and make the actual contact. It was further agreed that one Michael Melvin, and F.B.I. agent, would accompany Lanahan and would pose and be introduced as Lanahan's newly hired assistant.

Lanahan and Melvin made two trips to Denver and on each occasion had rather extended conversations with both O'Malley and Hudson. Also, Lanahan and Melvin were escorted around the plant premises of Applied by O'Malley. The latter in his conversations represented that: (1) Applied had a present capacity to produce 300,000 ounces of platinum at a cost to Matthey-Bishop of some $60,000,000; (2) that he, O'Malley, had a secret process for extracting precious metals in the form of platinum, gold and silver from ore and metal bars, known as dore bars, stockpiled on the premises of Applied; and (3) that a metal bar known as a "dore bar," given by O'Malley to Matthey-Bishop to show his "good faith," contained in excess of 85% platinum family elements. There was evidence adduced at trial by the Government to show that these representations, as well as others, were false.

Once O'Malley had exhibited his "good faith," as above referred to, O'Malley and Hudson were continually requesting Matthey-Bishop to show its "good faith" by issuing either a letter of credit or a letter of intent, or some other form of collateral, which they said would be placed in an escrow account which they (O'Malley and Hudson) claimed to have in the First National Bank of Nashville, Tennessee. When Lanahan and Melvin refused to thus show their "good faith," Hudson stated that there could be no loss to Matthey-Bishop if there was non-performance by O'Malley, since the collateral would then be returned from the escrow account to Matthey-Bishop. It later developed that O'Malley and Hudson did not have an escrow account in the Nashville bank, only a straight checking account from which they could withdraw anything deposited therein. During the entire negotiations the defendants were offering to sell 1,500 ounces of platinum per month to Matthey-Bishop with the latter to have first refusal on any production over 1,500 ounces per month. In connection therewith the evidence is such as to permit the inference that O'Malley and Hudson were putting pressure on Matthey-Bishop to immediately enter into a contract or at least indicate good faith by placing a letter of credit, or something akin thereto, in the escrow account in the Nashville bank.

As indicated, Matthey-Bishop never had any intention to enter into an agreement with O'Malley and Hudson. There is the suggestion that such fact, coupled with the further fact that it was Matthey-Bishop which first approached the defendants with a view toward buying platinum, defeats any charge that it was the defendants who devised a scheme to defraud Matthey-Bishop. We do not agree with this suggestion. In the first place, it was O'Malley and Hudson who first let it be known that they had platinum for sale. They contacted local brokers, who in turn contacted other brokers, and it was one of this latter group who initiated the first contact with Matthey-Bishop. So, in truth, Matthey-Bishop was contacted by the defendants, rather than vice versa. And the mere fact that Matthey-Bishop was suspicious from the start does not mean that the defendants did not themselves have a scheme to defraud some unwary purchaser, whoever he might be. In this

general connection it is well established that in a prosecution under 18 U.S.C. # 1343, i.e., use of interstate communications to further a preconceived scheme to defraud, the prosecution need not prove that the scheme was successful or that the intended victim suffered a loss or that the defendant secured a gain. The gist of the offense is a scheme to defraud and the use of interstate communications to further the scheme. See Brandon v. United States, 382 F.2d 607 (10th Cir. 1967); See also United States v. Jackson, 451 F.2d 281 (5th Cir. 1971), cert. denied, 405 U.S. 928; United States v. Gross, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970); and Huff v. United States, 301 F2d 760 (5th Cir. 1962), cert. denied, 371 U.S. 922.

As mentioned at the outset, counsel's basic theme as set forth in his brief is that O'Malley, though not technically a victim of entrapment, was nonetheless "set up" by Matthey-Bishop, to the end that he, O'Malley, did not, nor did he ever intend to have, any scheme to defraud. We disagree with this line of reasoning.

Our study of the record convinces us that the issue as to whether O'Malley had devised a scheme to defraud, and whether he had any actual intent to defraud, posed questions of fact that were properly submitted to the jury. By its verdict the jury has determined that O'Malley did have such a scheme and intent. And the record in our view is supportive of the jury's resolution of the matter. As indicated above, the issue is in reality O'Malley's state of mind, and the fact that Matthey-Bishop was not about to be taken in does not defeat the charge. Throughout counsel's brief runs the recurring question as to just what o'Malley could possibly have expected to gain from any representations he may have made to Matthey-Bishop. In our view the state of the record is such as to permit the inference that O'Malley and Hudson sought to pressure Matthey-Bishop into signing a contract to purchase platinum and making an immediate payment thereon, even though the defendants knew they would be unable to ever perform. And there is abundant evidence that when it became evident that Matthey-Bishop would not sign a contract, O'Malley and Hudson sought to have Matthey-Bishop at least

show its good faith by placing something of value in O'Malley's account in the bank in Nashville, Tennessee, which was a straight checking account, and not an escrow account as represented by both defendants. The foregoing are but two illustrations of possible gain envisioned by the defendants in their negotiations.

A recent opinion of the Colorado Court of Appeals involving this same defendant, O'Malley, is illustrative of the latter's modus operandi. See People v. O'Malley, Colorado Court of Appeals, No. 75-240, filed April 8, 1976. There O'Malley was trying to sell silver. There, as here, O'Malley escorted his prospective customer around the premises of Applied and made false representations as to the current capacity of the plant to produce silver. Indeed, a reading of that opinion indicates that O'Malley's misrepresentations were quite similar to those made in the instant case. There, however, the intended victim was not as wary as Matthey-Bishop and the victim in that case paid O'Malley some $60,000 on the latter's promise to sell him silver. In the Colorado case a jury found O'Malley guilty of theft by deception, # 18-4-401, C.R.S. 1973, and in effect found that O'Malley never intended to deliver the silver which he had contracted to deliver. On appeal the Colorado Court of Appeals, speaking through Judge Coyte, affirmed, and held that the State had established a prima facie case of theft by deception. The fact that here Matthey-Bishop refused to be rushed into a contract, unlike the victim in the Colorado case, no doubt explains the recurring efforts of O'Malley and Hudson to pressure Matthey-Bishop into making some sort of a good faith gesture by placing something, presumably of some value, into the defendant's non-existent escrow account in the Nashville, Tennessee bank. All in all, then, in our view, the record supports the jury's verdict.

O'Malley was permitted to file a pro se brief which was intended to supplement the brief of his retained counsel. In his pro se brief O'Malley urges some fourteen additional ground for reversal. It is sufficient to state that we have examined each

of these contentions and found none to be grounds for reversal.

Judgment affirmed.

IN THE UNITED STATES SUPREME COURT

October Term, 1975

No. _____

JOHN B. O'MALLEY, JR.,
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

CERTIFICATE OF MAILING

I, Mansur Tinsley, one of the attorneys for William O'Malley, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of August, 1976, I served copies of the Petition for Certiorari to the Circuit Court of the United States for the Tenth Circuit on the Respondent, the United States, as follows:

On the United States by mailing three copies in a duly addressed envelope, with postage prepaid, to the United States Attorney for the District of Colorado, Criminal Division, United States Court House, Denver, Colorado, 80203, and by mailing three copies thereof in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530

Mansur Tinsley

Mansur Tinsley
Attorney for Petitioner
7180 West 14th Avenue
Lakewood, Colorado 80215
Telephone: (303) 237-5415